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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 GREGORY RICHARDSON,  
9

10 *Petitioner,*

11 vs.

12 ANTHONY SCILLIA, *et al.*,  
13

14 *Respondents.*

2:08-cv-01481-JCM-RJJ

ORDER

15 This habeas matter under 28 U.S.C. § 2254 comes before the court for a final decision  
16 on the claims of ineffective assistance of counsel presented in the sole remaining ground.

17 ***Background***

18 Petitioner Gregory Richardson seeks to challenge his 2006 Nevada state conviction,  
19 pursuant to a jury verdict, of conspiracy to commit robbery, robbery with use of a deadly  
20 weapon, and battery with use of a deadly weapon. The court previously granted respondents'  
21 motion to dismiss grounds 1, 3, and 4. The only ground that remains, ground 2, presents  
22 claims of ineffective assistance of counsel. Petitioner pursued claims of ineffective assistance  
23 of counsel in the state courts in a state post-conviction petition.

24 ***Standard of Review***

25 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly  
26 deferential" standard for evaluating state-court rulings that is "difficult to meet" and "which  
27 demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*,  
28 131 S.Ct. 1388, 1398 (2011). Under this highly deferential standard of review, a federal court

1 may not grant habeas relief merely because it might conclude that the state court decision  
2 was incorrect. 131 S.Ct. at 1411. Instead, under 28 U.S.C. § 2254(d), the court may grant  
3 relief only if the state court decision: (1) was either contrary to or involved an unreasonable  
4 application of clearly established law as determined by the United States Supreme Court; or  
5 (2) was based on an unreasonable determination of the facts in light of the evidence  
6 presented at the state court proceeding. 131 S.Ct. at 1398-1401.

7 A state court decision is “contrary to” law clearly established by the Supreme Court only  
8 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or  
9 if the decision confronts a set of facts that are materially indistinguishable from a Supreme  
10 Court decision and nevertheless arrives at a different result. *E.g., Mitchell v. Esparza*, 540  
11 U.S. 12, 15-16, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003). A state court decision is not  
12 contrary to established federal law merely because it does not cite the Supreme Court’s  
13 opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware  
14 of its precedents, so long as neither the reasoning nor the result of its decision contradicts  
15 them. *Id.* Moreover, “[a] federal court may not overrule a state court for simply holding a view  
16 different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous.”  
17 540 U.S. at 16, 124 S.Ct. at 11. For, at bottom, a decision that does not conflict with the  
18 reasoning or holdings of Supreme Court precedent is not contrary to clearly established  
19 federal law.

20 A state court decision constitutes an “unreasonable application” of clearly established  
21 federal law only if it is demonstrated that the state court’s application of Supreme Court  
22 precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.,*  
23 *Mitchell*, 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 384 F.3d 628, 638 (9<sup>th</sup> Cir.  
24 2004).

25 To the extent that the state court’s factual findings are challenged, the “unreasonable  
26 determination of fact” clause of Section 2254(d)(2) controls on federal habeas review. *E.g.,*  
27 *Lambert v. Blodgett*, 393 F.3d 943, 972 (9<sup>th</sup> Cir. 2004). This clause requires that the federal  
28 courts “must be particularly deferential” to state court factual determinations. *Id.* The

1 governing standard is not satisfied by a showing merely that the state court finding was  
 2 “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

3 . . . . [I]n concluding that a state-court finding is unsupported by  
 4 substantial evidence in the state-court record, it is not enough that  
 5 we would reverse in similar circumstances if this were an appeal  
 6 from a district court decision. Rather, we must be convinced that  
 an appellate panel, applying the normal standards of appellate  
 review, could not reasonably conclude that the finding is  
 supported by the record.

7 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9<sup>th</sup> Cir. 2004); see also *Lambert*, 393 F.3d at 972.

8 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct  
 9 unless rebutted by clear and convincing evidence.

10 The petitioner bears the burden of proving by a preponderance of the evidence that  
 11 he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

### 12 **Governing Substantive Law**

13 On a claim of ineffective assistance of counsel, a petitioner must satisfy the two-  
 14 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674  
 15 (1984). He must demonstrate that: (1) counsel’s performance fell below an objective standard  
 16 of reasonableness; and (2) counsel’s defective performance caused actual prejudice. On the  
 17 performance prong, the issue is not what counsel might have done differently but rather is  
 18 whether counsel’s decisions were reasonable from his perspective at the time. The court  
 19 starts from a strong presumption that counsel’s conduct fell within the wide range of  
 20 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a reasonable  
 21 probability that, but for counsel’s unprofessional errors, the result of the proceeding would  
 22 have been different. *E.g.*, *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9<sup>th</sup> Cir. 2003).

23 While surmounting *Strickland*’s high bar is “never an easy task,” federal habeas review  
 24 is “doubly deferential” in a case governed by the AEDPA. In such cases, the reviewing court  
 25 must take a “highly deferential” look at counsel’s performance through the also “highly  
 26 deferential” lens of § 2254(d). *Pinholster*, 131 S.Ct. at 1403 & 1410.

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### ***Discussion***

In ground 2, petitioner alleges that he was denied effective assistance of counsel when trial counsel allegedly failed to fully investigate: (a) the reasons that prosecution witness Byroneasha Clark had for testifying for the State; and (b) a police report stating that .22 caliber cartridges were found at petitioner's residence.

#### ***Byroneasha Clark Testimony***

With regard to Byroneasha Clark's testimony, petitioner alleges in the federal petition that Clark "was offered and received inducements and/or promises for her testimony;" that Clark gave "3-4" conflicting statements, yet counsel never moved to suppress her testimony; that Clark wrote to petitioner stating that he was not involved in the crimes, yet counsel failed to investigate the claim; and that counsel knew of these matters yet refused to inform the court. He contends that counsel should have filed a motion to suppress Clark's testimony and presented her letters to petitioner with the motion.

The state supreme court rejected the claims presented to that court on the following grounds:

First, appellant claimed that his trial counsel was ineffective for failing to investigate the facts surrounding prosecution witness Byroneasha Clark's reasons for testifying for the prosecution prior to her giving a statement or testifying at trial. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At trial, both the State and appellant's counsel questioned Clark extensively regarding her decision to testify and the plea agreement she made with the State in exchange for her testimony. Moreover, both the State and appellant's trial counsel elicited testimony concerning how appellant's plea agreement impacted Clark's possible sentences for the charges she faced for her own involvement in the events involved in this case. Thus, the jury was well informed that Clark benefited from offering her testimony in the instant case and was able to determine how this fact affected Clark's credibility as a witness. Therefore, the district court did not err in denying appellant's claim.

Second, appellant claimed that trial counsel was ineffective for failing to file a motion to suppress Clark's testimony because Clark had offered three or four conflicting statements in regard to this case. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that such a motion would have been meritorious. Moreover, at trial, appellant's counsel elicited testimony

1 concerning inconsistencies in Clark's various statements and  
 2 testimony. Thus, the jury was aware of these inconsistencies.  
 Therefore, the district court did not err in denying this claim.

3 Third, appellant claimed that trial counsel was ineffective  
 4 for failing to investigate letters that Clark wrote to appellant  
 5 disavowing his participation in the crimes. Appellant failed to  
 6 demonstrate that he was prejudiced. At trial, the State elicited  
 7 testimony regarding a letter Clark wrote to appellant wherein  
 8 Clark stated that she knew that appellant had not engaged in any  
 9 wrongdoing. This letter, along with several others, was entered  
 into evidence and the jury was able to review the correspondence  
 that took place between appellant and Clark prior to appellant's  
 trial. Appellant failed to elucidate how a further investigation  
 concerning this correspondence would have altered the outcome  
 of his trial. Therefore, the district court did not err in denying this  
 claim.

10 #27, Ex. 36, at 2-4 (citation footnotes omitted).

11 Petitioner has failed to establish, under the applicable "doubly deferential" standard of  
 12 review, that the state supreme court's rejection of his claims regarding Byroneasha Clark's  
 13 testimony was either contrary to or an unreasonable application of *Strickland*. The state  
 14 supreme court's summary of the pertinent trial evidence is presumed to be correct unless  
 15 shown to be incorrect by clear and convincing evidence. *See, e.g., Sims v. Brown*, 425 F.3d  
 16 560, 563 n.1 (9<sup>th</sup> Cir. 2005). Petitioner has not so demonstrated here, and the state supreme  
 17 court's recital instead is amply supported by the state court record.<sup>1</sup> At bottom, petitioner's  
 18 claims as to Clark's testimony are grounded in the fundamentally flawed premise that trial  
 19 counsel would have been able to wholly exclude Clark's testimony if he had filed a motion to  
 20 suppress her testimony because of prior inconsistent statements, including those in her letters  
 21 to petitioner, and incentives to testify. Such inconsistencies and incentives, however, are

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23 <sup>1</sup>See #25-8, Ex. 20, Part 2, at 36-40 & 47 (Byroneasha Clark); #25-9, Ex. 20, Part 3, at 72-92 (same);  
 24 #26-2, Ex. 21, Part 1, at 3-32 (same); see also #26-3, Ex. 21, Part 1, at 42-68 (detective Edward Laneve);  
 25 #26-4, Ex. 21, Part 3, at 98-99 & 112-13 (detective Samuel Smith).

26 As discussed in a prior order (#32), petitioner's response to respondents' answer and motion to  
 27 dismiss, in the main, was directed to claims that never have been brought before this court in the petition or  
 28 an amendment thereto. To the limited extent that petitioner discusses a claim of ineffective assistance of trial  
 counsel for failure to conduct investigation as to Clark's testimony, he refers exclusively to circumstances  
 that, to the extent *arguendo* exhausted as a basis for the claim, were explored at trial. See #29, at electronic  
 docketing pages 15-16.

1 matters to be considered by the jury in weighing the evidence; they do not provide a viable  
2 basis for a motion to suppress. While criminal defendants commonly assume that prior  
3 inconsistent statements and incentives to testify automatically provide a lock cinch basis for  
4 excluding a witness' testimony, that assumption is not supported by controlling law.

5 The claims regarding Byroneasha Clark's testimony therefore do not provide a basis  
6 for federal habeas relief.

7 ***.22 Caliber Cartridges***

8 With regard to the .22 caliber cartridges found at his residence, petitioner alleges that  
9 further investigation would have shown that "several people were in and out of that area of  
10 the residence" and would have determined "whether the .22 caliber shells found were of the  
11 same type used in the crime."

12 The state supreme court rejected the claims presented to that court on the following  
13 grounds:

14 Fourth, appellant claimed that his trial counsel was  
15 ineffective for failing to investigate the access of other persons to  
16 the place where the .22 caliber shells were found in appellant's  
17 residence. Appellant failed to demonstrate that his trial counsel  
18 was deficient or that he was prejudiced. At trial, Lieutenant  
19 Theodore Snodgrass testified that Richardson admitted to  
20 possessing the ammunition, stating, "He said something about  
21 that he had been holding them for somebody.... That he was  
22 holding the shells for someone else." Appellant failed to state  
23 which individuals, other than himself, had access to the area  
24 where he admitted he was keeping the shells. Therefore, the  
25 district court did not err in denying this claim.

26 Fifth, appellant claimed that his trial counsel was  
27 ineffective for failing to investigate whether the .22 caliber shells  
28 that were found in his residence were of the same type as the  
cartridge found at the scene of the crime. At trial, Dinnah Caluag  
of the LVMPD forensic lab, an expert in the area of firearms and  
tool marks examinations, testified that the cartridge case found at  
the scene of the crime was consistent with a portion of the  
ammunition found in appellant's closet because they shared  
common manufacturing marks. However, Caluag also testified  
that she could not conclusively state that the cartridge case found  
at the crime scene came out of the box of ammunition found in  
appellant's closet. Thus, while the evidence did not conclusively  
show that the cartridge found at the crime scene came out of the  
ammunition box found in appellant's closet, it did show that the  
ammunition found in appellant's closet was of the same type as  
the cartridge found at the scene. Thus, it is unlikely that further

1 investigation of this issue would have altered the outcome of  
2 appellant's trial. Therefore, the district court did not err in denying  
3 appellant's claim.

4 #27, Ex. 36, at 4-5 (citation footnotes omitted).

5 Petitioner has failed to establish that the state supreme court's rejection of his claims  
6 regarding the .22 caliber cartridges was either contrary to or an unreasonable application of  
7 *Strickland*. The state supreme court's summary of the pertinent trial evidence is presumed  
8 to be correct unless shown to be incorrect by clear and convincing evidence. *Sims, supra*.  
9 Petitioner has not so demonstrated here, and the state supreme court's recital instead is well  
10 supported by the state court record.<sup>2</sup> Petitioner's suggestion in the federal petition that further  
11 investigation was necessary to determine whether the .22 caliber cartridges found were of the  
12 same type used in the crime is belied by the record. It was established that the .22 shell case  
13 found at the scene was a Federal .22 caliber case and that the cartridges found at petitioner's  
14 residence were Federal .22 caliber cartridges. Moreover, with regard to any possible  
15 evidence that as-yet still unidentified others had access to the area with the cartridges, the  
16 beneficial impact of any such alleged evidence would have been sharply curtailed by  
17 Richardson's own statement that he was holding the cartridges for someone else, admitting  
18 that the cartridges were in his possession at the residence.

19 The claims regarding the Federal .22 caliber cartridges found at petitioner's residence  
20 accordingly also do not provide a basis for federal habeas relief.

21 IT THEREFORE IS ORDERED that the petition for a writ of habeas corpus shall be  
22 DENIED and that this action shall be DISMISSED with prejudice on the merits.

23 IT FURTHER IS ORDERED that a certificate of appealability is DENIED. Reasonable  
24 jurists would not find debatable or wrong this court's conclusion that the state supreme court's  
25 rejection of petitioner's claims was neither contrary to nor an unreasonable application of

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26 <sup>2</sup>See #25-5, Ex. 19, Part 1, at 3-6 & 14-18 (crime scene analyst Randall McPhail); #25-6, Ex. 19, Part  
27 2, at 56-59 & 64 (officer Ramon Kent); #26-3, Ex. 21, Part 2, at 78-80 (detective Samuel Smith); #26-4, Ex.  
28 21, Part 3, at 81-86, 92-93 & 109 (same); #26-5, Ex. 22, Part 1, at 19-33 (firearms and toolmark examiner  
Dinnah Caluag); #26-6, Ex. 22, Part 2, at 34-45 (same); *id.*, at 46-49, 51-54, 57-59 & 62-65 (detective  
Theodore Snodgrass).



1 clearly established federal law. Petitioner's claims of ineffective assistance of counsel  
2 regarding possible exclusion of Byroneasha Clark's testimony are grounded in the flawed  
3 premise that the witness' testimony could be wholly excluded on a motion to suppress based  
4 upon her prior inconsistent statements and incentives to testify. Such matters instead were  
5 fodder for cross-examination and in fact were explored at trial. Petitioner's claims of  
6 ineffective assistance of counsel regarding the .22 caliber cartridges found at his residence  
7 ignore: (a) testimony establishing that the cartridges found at his residence in fact were of  
8 the same manufacture as the shell case found at the scene, and (b) his own statement  
9 admitting that it was he – not another person – that possessed the cartridges at his residence,  
10 albeit allegedly in holding them for someone else. The state supreme court's rejection of  
11 petitioner's flawed claims clearly was neither contrary to nor an unreasonable application of  
12 clearly established federal law under the "doubly deferential" standard of review applicable  
13 to such claims.

14 The clerk of court shall enter final judgment accordingly, in favor of respondents and  
15 against petitioner, dismissing this action with prejudice.

16 DATED February 13, 2012.

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19 JAMES C. MAHAN  
20 United States District Judge  
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